

*Durango Fire Protection v. Troncoso*, 98 P.3d 691 (Nev. 2004)<sup>1</sup>

**PRETRIAL PROCEDURE, APPEAL FROM JUDGMENT, SANCTIONS**

**Summary**

Appeal from a district court order denying defendant's motion to set aside a judgment arising out of a breach of contract action.

**Disposition/Outcome**

Affirmed. The Nevada Supreme Court held that (1) the judgment was not a default judgment, and thus, the defendant was not entitled to written notice before entry of judgment; and (2) the defendant did not show excusable neglect, as basis for relief from judgment.

**Factual and Procedural History**

In 1999, Fernando Troncoso filed a breach of contract action against Durango Fire Protection, Inc., (Durango) and its owner, Julian Montoya. In March 2000, Durango filed its answer to the complaint.

On June 6, 2001, a discovery conference was held. Joann Montoya, Secretary-Treasurer of Durango, was present at the discovery conference and was informed that Durango was required to file a case conference report with Troncoso's signature before June 29, 2001, and that she needed to secure counsel for Durango to do this or Durango's answer would be stricken. On July 20, 2001, Troncoso filed a motion to strike Durango's answer for failure to comply with the discovery commissioner's recommendation. That motion, however, was denied.

In December 2001, Durango's counsel at the time, J.E. Ring Smith, moved to withdraw. In early January 2002, the district court twice continued calendar calls because no representative appeared on behalf of Durango. The district court advised Troncoso's counsel that if a representative for Durango did not appear at the next calendar call, counsel could file an appropriate motion. On January 22, 2002, calendar call was held, and no representative for Durango appeared; therefore, the district court granted Troncoso's oral motion to strike Durango's answer and entered judgment in favor of Troncoso.

Later, Smith, Durango's counsel, appeared and was advised of the district court's ruling striking Durango's answer. At that time, the district court granted Smith's motion to withdraw as counsel and instructed him to inform Durango of the ruling striking its answer and to advise Durango to obtain a new attorney if it wished to go forward.

On February 25, 2002, the district court entered an order granting Troncoso's oral motion to strike Durango's answer, entering judgment in favor of Troncoso, and granting Smith's motion to withdraw as counsel. On April 25, 2002, the district court filed a judgment in favor of Troncoso in the amount of \$15,000, plus \$5,975.72 in attorney fees and costs.

Subsequently, Durango filed a motion to set aside the "default judgment" pursuant to NRCPP 60(b). Durango argued that it was entitled to relief from judgment due to mistake, fraud, and/or misrepresentation. In an affidavit attached to the motion, Julian Montoya explained that

---

<sup>1</sup> By: Christina H. Wang

he had no knowledge of the hearing in which Durango's answer was stricken. Julian maintained that he and his wife Joann were in the midst of a divorce, and that Joann was doing everything in her power to ruin him, including not informing him of Durango's duties in this case. Further, Julian maintained that he had communicated with Smith about the case. According to Julian, Smith told him that he could no longer represent Durango because he had a separate attorney-client relationship with Joann, but said that he would complete certain aspects of the case and get back to him. Julian claimed that Smith never got back to him, and he was never informed that Smith had officially withdrawn. Additionally, Durango argued that it was entitled to relief based on several procedural errors preceding the entry of judgment in favor of Troncoso.

The district court found that Durango had ignored the case by failing to appear at several calendar calls and hearings. The court stated that it was not persuaded by Durango's argument that counsel did not inform Julian about any of the calendar calls. Accordingly, the district court denied Durango's motion to set aside the judgment.

On appeal, the Nevada Supreme Court affirmed, holding that (1) the judgment was not a default judgment, and thus, the defendant was not entitled to written notice before entry of judgment; and (2) the defendant did not show excusable neglect, as basis for relief from judgment.

## **Discussion**

On appeal, Durango argued that the district court's failure to comply with NRCP 55(b)(2) voids the judgment, and as a result, the district court erred in not granting relief from the judgment. The Nevada Supreme Court, however, noted that Durango did not raise this issue below, and that it generally will not address an issue raised for the first time on appeal.<sup>2</sup> Nevertheless, the court addressed this issue in order to clarify that the district court had the discretion to sanction Durango by entering judgment against it without complying with the notice requirement in NRCP 55(b)(2).

NRCP 55(b)(2) states that a "party entitled to a judgment by default shall apply to the court therefor," and "[i]f the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application." Moreover, the Nevada Supreme Court has stated: "Written notice of application for default judgment must be given if the defendant or representative has appeared in the action. The failure to serve such notice voids the judgment."<sup>3</sup>

The court observed that there is no question Durango made an appearance, given that it filed an answer to Troncoso's complaint and appeared at the discovery conference. Also, it appeared from the record that Durango was not given written notice prior to the district court's decision to enter judgment in Troncoso's favor. However, the court concluded that written notice was not required because it was not convinced that the judgment entered in this case was a default judgment. Instead, the court interpreted the district court's action in entering judgment in Troncoso's favor as a sanction for Durango's continued failure to appear at scheduled proceedings. The court emphasized that the district court has the discretion to sanction parties in

---

<sup>2</sup> See *Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 447, 488 P.2d 911, 915 (1971) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

<sup>3</sup> *Christy v. Carlisle*, 94 Nev. 651, 654, 584 P.2d 687, 689 (1978).

such a manner.<sup>4</sup> The court clarified that such a sanction does not require that notice first be given pursuant to NRCPC 55.

After reviewing the record, the court concluded that the district court did not abuse its discretion in entering judgment against Durango after striking its answer. Durango was on notice that it was required to appear at several calendar calls and other hearings, yet failed to appear. Although Julian argues that he did not actually receive notice of the various proceedings, notice was mailed to his address and placed in Durango's counsel's file at the courthouse. Because NRCPC 55(b) was not implicated by the district court's actions taken to sanction Durango, no prior notice was required and, thus, the judgment was not void.

For the same reason, the court concluded that the district court did not abuse its discretion in denying Durango's motion for relief from judgment based on attorney neglect.<sup>5</sup> Although the district court may relieve a party from a final judgment due to excusable neglect,<sup>6</sup> the district court has wide discretion in determining what neglect is excusable and what neglect is inexcusable.<sup>7</sup>

In *Staschel v. Weaver Brothers, Ltd.*,<sup>8</sup> the Nevada Supreme Court held that attorney neglect amounting to misconduct is not properly imputed to the client in determining whether a default judgment should be set aside. Here, however, the court noted that Julian received independent notice of the calendar calls. Also, Smith specifically informed Julian that he would be withdrawing due to a conflict with Julian's ex-wife. Finally, unlike the attorney in *Staschel*, there was no evidence in the record that Smith affirmatively misrepresented the status of the case to Julian. The court therefore concluded that the district court did not abuse its discretion in finding that Durango had not established grounds to set aside the judgment.

## **Conclusion**

The Nevada Supreme Court concluded that the district court did not abuse its discretion in sanctioning Durango by striking its answer and entering judgment in Troncoso's favor. The court further concluded that when a district court sanctions a party in this manner, the notice requirement of NRCPC 55 is not implicated.

---

<sup>4</sup> See *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (cautioning litigants and attorneys that district courts have inherent equitable powers, not specifically proscribed by statute, to dismiss an action for litigation abuses).

<sup>5</sup> *Kahn v. Orme*, 108 Nev. 510, 513, 835 P.2d 790, 792 (1992) (recognizing that the district court is afforded broad discretion in ruling on motions for relief from judgment).

<sup>6</sup> NEV. R. CIV. P. 60(b)(1).

<sup>7</sup> *Lowrance v. Lowrance*, 87 Nev. 503, 506, 489 P.2d 676, 678 (1971).

<sup>8</sup> 98 Nev. 559, 655 P.2d 518 (1982).